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Supreme Court, U.S.
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NO. 08 -

IN THE
SUPREME COURT OF THE UNITED STATES

DENIS CALDERON

Petitioner,

V.

THOMAS HOGAN, Warden
YORK COUNTY PRISON

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the lower federal Courts err in failing to address Petitioner's constitutional issues on the merits since Petitioner's untimely filing of his federal habeas corpus petition should have been offset by his presentation of evidence of actual innocence?

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Petitioner, Denis Calderon, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Third Circuit entered in the above-captioned matter on December 17, 2007, denying the Petition for Rehearing en Banc.

OPINIONS BELOW

Neither the initial order of the Court of Appeals for the Third Circuit denying a Certificate of Appealability nor the above-mentioned Rehearing order has been officially reported. Moreover, neither the Order of the Honorable John P. Fullam of the Eastern District of Pennsylvania denying the Writ as well as the Certificate of Appealability, nor the Report and Recommendation of United States Magistrate Judge L. Felipe Restrepo have been reported. These Orders and the Magistrate Judge's

Report and Recommendation have been reprinted at Appendices "A-D" respectively.

BASES FOR JURISDICTION

A Petition for Rehearing en Banc from the Third Circuit's denial of the issuance of a Certificate of Appealability was denied on December 17, 2007. Jurisdiction of this Court to review the denial of that Petition is invoked under 28 U.S.C.§1254(1). See also,.

STATUTORY PROVISIONS INVOLVED

28 U.S.C.§2244(d)(1) provides in pertinent part:

> "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgement of a state court...."

CONCISE STATEMENT OF THE CASE

Petitioner, Denis Calderon, and his co-defendant, Julio Maldonado, were arrested and tried for attempted murder, aggravated assault, possession of an innocent of crime and related offenses in the Philadelphia Court of Common Pleas. This matter arose out of an ugly, racially motivated incident on August 4, 1996, where they were attacked by 15-30 young, drunken, white youths, apparently because Mr. Calderon's family was the first Hispanic family, and indeed the first people of color, in their neighborhood. Most of the wrath of these out-of-control youths was directed at Mr. Calderon who was stabbed with knives, and several of the youths beat upon him with fists and kicks. A number of other youths threw bottles at both Maldonado. During the

melee, Calderon and Maldonado allegedly struck one of the youths, Christian Saladino, with a club, causing a catastrophic brain injury and putting Mr. Saladino in a near vegetative state from which he would never recover. Mr. Calderon allegedly struck Saladino in the abdomen with a bat which he retrieved from his house after escaping from the youths.

Remarkably, only Petitioner and Maldonado were charged. They were tried in a bench trial before the Honorable Gregory E. Smith in the Philadelphia Court of Common Pleas. They were convicted of aggravated assault, possession of an instrument of crime, simple assault, recklessly endangering another person, terroristic threats and criminal

conspiracy. Both were sentenced to an aggregate sentence of 2-10 years.

The matter was timely appealed to the Pennsylvania Superior Court. On February 3, 1999, that Court found that there was sufficient evidence to convict of all charges. However, the Court remanded the matter to Judge Smith to hold an evidentiary hearing to determine whether trial counsel had been ineffective for failing to call Walter Hofman, M.D., a forensic Pathologist. See, No. 3674 PHL 1997, filed 2/3/99.

In the meantime, Mr. Saladino passed away, and the defendants were charged with murder. A jury trial was held before the Honorable Amanda Cooperman in March and April, 2000 in the

Philadelphia Court of Common Pleas, and both Mr. Calderon and Mr. Maldonado were found not guilty of those charges. It is significant that Dr. Hofman testified at that trial that neither Mr. Calderon nor Mr. Maldonado could have struck Mr. Saladino. Patricia Ann Waters, who was also not called at the trial before Judge Smith, provided testimony that neither Calderon nor Maldonado struck Mr. Saladino.

At the remand hearing before Judge Smith, on April 10, 2000, Dr. Hofman testified that there had been no external or internal evidence of injury. Indeed, the medical evidence from Mr. Saladino's two months' stay at Einstein Hospital in Philadelphia reflected that there was no evidence of brain injury either from falling and striking his head or being hit

on the head causing brain injury. There was also no evidence of trauma to his back, head, or abdomen, and no evidence of any blunt force injury was seen by several physicians over that two month period. Furthermore, there was no evidence of bleeding in the brain after a CT Scan was taken, and a CT Scan of the abdomen was also negative. N.T. 4/10/00, 9-13.

Dr. Hofman opined that if Mr. Saladino had been struck with a club or bat, as the prosecution witnesses contended, this would have left a mark on the internal or external portion of the brain causing a localized injury manifested by swelling, bleeding and bruising. Indeed, there would have been some evidence of a mark after just two to four hours, let alone two (2) months. No break in the skin or bruise

ever appeared leading Doctor Hofman to conclude there was no evidence of blunt force trauma. Hence, Dr. Hofman opined that the coma was not caused as a result of a blow to the head or any other part of his body and that in his opinion no one struck Mr. Saladino. Finally, Dr. Hofman opined that trauma in the nature of swelling, a mark, or a bruise would show up every time someone is hit with a bat or a club hard enough to knock them off their feet. Id. at 13-18, 24, 28-29, 38-41, 71.

After hearing this testimony, Judge Smith granted a new trial, finding trial Counsel ineffective for failing to investigate and call a medical expert at trial. Nonetheless, the Superior Court of Pennsylvania in No. 1551 EDA 2000, held that the

failure to present this evidence did not constitute ineffective assistance of counsel because the defendants were only convicted of "attempted assault."

Because of this finding, it is critical to set forth Judge Smith's findings of fact at the time of the entry of the guilty verdict:

> As to Calderon, it appears he had indeed retreated into the home and came back out. The only justification of that would be self-defense of others which I believe is really what happened. He went out to help Maldonado, but in doing so **he struck the victim** who was already down. **I believe he struck him once**. Again the question there is whether the intent is to cause him serious bodily injury or to get these people back - somehow use him as a shield of some sort or as a reason to get these people back again thinking all these people are together, but they're not. The Court so finds that they're not.

> Again, he should not have struck this young man while he is lying down.

N.T. 5/13/97, 4-5 (emphasis added).Clearly, Judge Smith did not base his decision on the fact that there had merely been an attempted striking.

The Supreme Court of Pennsylvania denied Allowance of Appeal on November 25, 2003 in No. 380 EAL 2002.

On March 7, 2006, Petitioner filed his 2254 Petition in the Eastern District of Pennsylvania. The Petition requested that the Court issue of writ of habeas corpus granting a new trial. The Petition was admittedly filed beyond the AEDPA's one-year statute of limitations set forth in 28 U.S.C. §2244(d)(1). Petitioner contended that since the testimony of Dr. Hofman and Ms. Waters had

demonstrated Petitioner's actual innocence both in the not guilty verdict rendered by the jury in the murder trial and in the finding of Judge Smith that trial Counsel had been ineffective in not investigating the medical issues through consultation with a forensic pathologist, both the cause and prejudice standard had been met and further that since there was evidence of absolute innocence, there had been a miscarriage of justice when Mr. Calderon was convicted. It was further argued these circumstances provided either an exception to the AEDPA's statute of limitations and the Court should find that the statute was equitably tolled and should address the merits of the Petition, or that the miscarriage of justice exception - Petitioner's showing of actual and

absolute innocence - should have permitted Petitioner to avoid the time strictures of that statute and led to the hearing of the matter on the merits as he should have been permitted to pass through the Habeas Corpus "gateway".

However, United States Magistrate Judge, L. Felipe Restrepo recommended that the writ be denied in his Report and Recommendation. See Appendix "D". That Court reasoned that since Petitioner had not provided any reason for failing to file the Petition timely, the statute of limitations had been violated and the writ should be denied, principally citing Horning v. Lavan, 197 Fed. Appx. 90 (3d. Cir. 2006). App. "D" 13-16. The Court did not address whether the actual innocence exception would permit the

Court to address the merits, but only addressed the issue of whether that exception would toll the statute of limitations, finding that it did not.

The Honorable John P. Fullam adopted those findings without issuing an Opinion and did not issue a Certificate of Appealability. App "C". Timely appeal was taken to the Third Circuit Court of Appeals, and a Panel of that Court denied the Petition for Certificate of Appealability in a decision filed on October 24, 2007. App. "B". The Order stated the following:

> "The foregoing request for a certificate of appealability is denied because the appellant has not made a 'substantial showing of the denial of a constitutional right.' 28 U.S.C.§2253(c)(2). In particular, for the reasons explained by the Magistrate Judge, Calderon has not shown that reasonable jurists would

debate the district court's dismissal of his petition on statute-of-limitation grounds. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

A Petition for Rehearing en Banc was denied on December 17, 2007. See, App. "A".

CONCISE STATEMENT OF REASONS FOR GRANTING REHEARING

MR. CALDERON'S ACTUAL INNOCENCE OVERCOMES THE PROCEDURAL DEFAULT

While it is clear that the Petitioner did not file this Petition within one year of the exhaustion of state remedies, it is respectfully submitted that Mr. Calderon's actual innocence should overcome the procedural default caused by his late filing. Indeed, several of this Court's decisions have held that evidence of actual innocence overcomes the type of

procedural default, such as occurred in this case, and permits the Petitioner to pass through the habeas corpus "gateway.". See, e.g. House v. Bell, 126 S.Ct. 2064 (2006); Dretke v. Haley, 127 S.Ct. 1847 (2004); Bousley v. United States, 523 U.S. 612 (1998); Schlup v. Delo, 513 U.S. 298, 319 (1995); McCleskey v. Zant, 499 U.S. 467 (1991);and Murray v. Carrier, 477 U.S. 478 (1986).

To obtain a Certificate of Appealability, a petitioner challenging a criminal conviction under §2254 must make a "substantial showing of the denial of a constitutional right." 28 U.S.C.§2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). This standard is satisfied by demonstrating that "reasonable jurists could debate

whether . . . the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000). When the District Court denies a petition on procedural grounds as in this case, the standard is further refined, requiring petitioner to show that reasonable jurists could find it debatable whether (1) the petition states a valid claim of the denial of a constitutional right and, (2) the District Court's procedural ruling was correct. Id.

Obviously, the Third Circuit found that reasonable jurists would not debate the District Court's dismissal. However, it is respectfully submitted, as will be set out below, that Mr.

Calderon's demonstration of actual innocence would permit him to pass through the habeas corpus "gateway" and compel the District Court to address his constitutional claim of ineffective assistance of counsel on the merits.

Here, the testimony of Dr. Hofman has never been challenged on its scientific merits nor rebutted by the Commonwealth with an expert witness of its own in any of the proceedings in this case. Indeed, neither side at the aggravated assault trial presented a medical forensic expert who could establish how Mr. Saladino had been injured as the Commonwealth relied solely on eyewitness testimony of two young girls who had a view from hundreds of feet away.

In Schlup v. Delo, this Court held that a

petitioner may use a claim of actual innocence as a "gateway" or a means of excusing a procedural default and enable him or her to obtain review of constitutional challenges to their conviction. Id. at 315-17. That case set forth the following standard for determining the question of actual innocence:

> The [Murray v.] Carrier standard requires the habeas Appellant to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." 477 U.S. at 496, 106 S.Ct. at 2649-2650. To establish the requisite probability, the Appellant must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. The Appellant thus is required to make a stronger showing than that needed to establish prejudice.

513 U.S. at 327-328.

This is not the potentially colorable, but hypothetical, case as in Schlup v. Delo, but rather this is the extraordinarily rare case in which a jury has already heard the testimony of both Dr. Hofman and Patricia Ann Waters and has found Petitioner not guilty. In Counsel's research he found no other case where a jury had already heard this evidence of actual innocence and deliberated upon same.

Moreover, Judge Smith granted a new trial after hearing this testimony, finding trial Counsel ineffective for failing to present the evidence of Dr. Hofman, which refuted the eyewitness testimony that both Petitioner and Mr. Maldonado had struck Mr. Saladino. Hence, it has already been conclusively proven that no reasonable juror having heard this

new evidence would have convicted Mr. Calderon in light of this new evidence.

In addition, in Commonwealth v. Widmer, 560 Pa. 308, 744 A. 2d. 745, 751 (2000), the Pennsylvania Supreme Court noted that "[w]here the evidence offered to support the verdict is in contradiction to the physical facts, and in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law." (Citation omitted). Here, Dr. Hoffman's testimony amply demonstrates that the testimony of the eyewitnesses who claim that they saw both Mr. Maldonado and Mr. Calderon strike Mr. Saladino were clearly in error as their testimony was "in contradiction to the physical facts" and "in

contravention to human experience and the laws of nature".

In Schlup v. Delo, the Court also stated:

> "However, if a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of the underlying claims."

Id. at 316, 115 S.Ct. at 861 (emphasis added).

This Court also utilized the actual innocence doctrine in Bousley v. United States, 523 U.S. 612, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). There, the defendant had failed to appeal from his plea of carrying a firearm in violation of 18 U.S.C. §924(c)(1). Since the petitioner failed to challenge the validity of

his plea on appeal, the Supreme Court held that he procedurally defaulted the claim regarding that plea. Id. at 621, 118 S.Ct. at 1610. Nonetheless, the Court instructed that this procedural default could be remedied, and his claims reviewed on the merits if Bousley could demonstrate that he was "actually innocent." Id. at 622, citing Murray v. Carrier, supra.

The miscarriage of justice exception to habeas review has also been authorized to be used when the state prisoner has procedurally defaulted his state remedies. See, e.g., House v. Bell, supra; Murray v. Carrier, supra.; and McClesky v. Zant, supra. It is respectfully submitted there is no reason why the lower Courts should not have granted Mr. Calderon

the same leeway when he procedurally defaulted his federal habeas remedy because of his late filing.

Given the above case law, it is further respectfully submitted that the Third Circuit has so far departed from the accepted and usual course of proceedings in addressing the miscarriage of justice exception. Given that this new scientific evidence, provided by Dr. Hofman, has amply demonstrated Mr. Calderon's innocence and has destroyed confidence in the outcome of his trial, it is respectfully requested that this Court grant this cert. petition, exercise its supervisory powers, and permit Mr. Calderon to pass through the habeas corpus gateway and have his constitutional claims addressed on the merits.

SPLIT IN THE CIRCUITS RE: EFFECT OF ACTUAL INNOCENCE CLAIMS ON TOLLING AEDPA'S STATUTE OF LIMITATIONS

This Court has "never squarely addressed the question [of] whether equitable tolling is applicable to AEDPA's statute of limitations." Pace v. Diguglielmo, 544 U.S. 408, 418 n.8 (2005). Hence, the Court has obviously not determined whether a showing of actual innocence would warrant equitable tolling of the limitations period and whether the showing of actual innocence in that context is the same as that necessary to avoid a procedural bar. This lack of direction has led to a split of authority amongst the Circuits.

Clearly, the Third Circuit in Horning v. Levan, supra., has determined that the habeas petitioner

must show that he or she exercised diligence in investigating and bringing claims before a District Court can even decide whether the actual innocence exception applies to toll the statute of limitations. 197 Fed. Appx. at 93.

Other Circuits also require a showing of diligence. See, Flanders v. Graves, 299 F.3d 974, 978 (8th Cir. 2002) (even where evidence of actual innocence is demonstrated, "petitioner would have to show some action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion or..... that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations."); Miller v Marr, 141 F.3d

976, 978 (10th Cir. 1998)(equitable tolling appropriate when habeas petitioner is actually innocent but would still have to demonstrate diligence in pursuing the federal habeas claims).

The Seventh Circuit has rejected this position holding that even if the habeas petitioner claims to be actually innocent, he or she must still meet the statutory requirement of timely action. See, Escamilla v. Jungwirth, 426 F.3d. 868, 872 (7th Cir. 2005).

The Second Circuit has taken a hybrid approach instructing the District Courts to first determine whether the Petitioner has presented a colorable claim of actual innocence before addressing the issue of whether such evidence would toll the

statute of limitations; and also whether the claim was pursued with reasonable diligence and whether such diligence is necessary before the claim can be addressed on the merits. See, Whitley v. Senkowski, 317 F.3d 223, 225-226 (2nd Cir. 2003).

The Eleventh Circuit has taken a similar approach, requiring the District Courts to determine whether the petitioner can make a showing of actual innocence before addressing the question of whether the Suspension Clause requires such an exception for actual innocence. See, Wyzykowski v. Dep't of Corrections, 226 F.3d 1213, 1218 (11th Cir. 2000).

The Ninth Circuit has also taken a middle ground position that is slightly different than those of the Second and Ninth Circuits. In Majoy v. Roe,

296 F.3d 770 (9th Cir. 2002), the Court concluded that the petitioner might be able to demonstrate a miscarriage of justice and remanded the matter to the District Court to determine whether a colorable claim of actual innocence had been presented and then determine what consequence such a finding has on tolling the statute of limitations. It hinted that if this showing could be made, the statute of limitations could be overridden. Moreover, the Court reached this conclusion even though the petitioner had not demonstrated diligence in uncovering newly discovered evidence pursuant to §2244(d)(1)(d). Id. at 776-778.

The Fifth and First Circuits have rejected equitable tolling entirely even when a petitioner

presents a colorable claim of actual innocence. In Felder v. Johnson, 204 F.3d 168, 171 (5th Cir. 2000), cert. denied, 531 U.S. 1035 (2000), the Court noted that a claim of actual innocence would not even constitute a "rare and exceptional" circumstance which would justify the equitable tolling of the limitations, "given that many prisoners maintain they are innocent." In David v. Hall, 318 F.3d 343, 347 (1st Cir. 2003), the Court held that the assertion of an actual innocence claim does not override the statute of limitations and would not toll same.

The Sixth Circuit has taken a vastly different approach than all the other Circuits. In Souter v. Jones, 395 F.3d 577 (6th Cir. 2005), the Court found that a colorable showing of actual innocence had

actually been presented in the District Court. It then conducted a searching inquiry of federal decisional law to determine whether a factually innocent petitioner should be granted equitable tolling. The Court concluded that equitable tolling was proper in these circumstances and directed the District Court to address the merits of Souter's claims even though there has been a procedural default. Moreover, the Court did not require evidence of diligence as a prerequisite to reaching the merits.

Several District Courts have also found that a showing of actual innocence tolls the statute of limitations. In Holloway v. Jones, 166 F.Supp.2d 1185 (E.D.Mi. 2001), the District Court principally citing District Court opinions, concluded that where

a Petitioner can demonstrate that he or she is actually innocent, denying equitable tolling would violate either the Suspension Clause of the United States Constitution (Article 1, §9 CL.2) or the Eight Amendment's ban on cruel and unusual punishment.

In Lisker v. Knowles, 463 F.Supp.2d 1008, 1038 (C.D.CAL. 2006), the Court adopted the Magistrate's Report and Recommendation which concluded that the statute of limitations must be tolled when proffered evidence demonstrates a colorable showing of actual innocence and that the dismissal of the habeas petition would comprise a miscarriage of justice under Schlup.

Finally, in Garcia v. Portuondo, 344 F.Supp.2d

446 (S.D.N.Y. 2004), the Court held that the running of the AEDPA's statute of limitations is equitably tolled in the exceedingly rare case in which the petitioner makes out a credible claim of actual innocence, finding that that standard had been met in that case. See also, United States v. Zuno-Arce, 25 F.Supp.2d 1087, 1100 (C.D.CAL. 1998), affirmed, 245 F.3d 1108 (9th Cir. 2001)(the Court reasoned that to foreclose habeas review for a claim of actual innocence might violate either the Eight Amendment of the Suspension Clause, or comprise a due process violation).

It is clear from reviewing the above holdings that there is a great disparity in how the Courts approach the issue of actual innocence. Even though

Mr. Calderon has, at the very least, presented a colorable claim of actual innocence under Schlup, the Circuit Courts would address his situation far differently.

Some circuits would not even entertain this claim (the First and Fifth); some circuits would not entertain the claim because it was not brought with appropriate diligence (the Third, Eight, and Tenth); one would not address the claim because it was not brought within the statutory time limits (the Seventh); some might address the issue, but have not provided clear direction on this issue because no case of actual innocence has ever been brought before their Courts (the Second, Ninth, and Eleventh); and only one, the Sixth Circuit, would appear to instruct

that the District Court must address the matter on its merits.

In Lonchar v. Thomas, 517 U.S. 314, 324 (1996), this Court noted that:

> "Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."

See also, O'Neal v. McAninch, 513 U.S. 432, 442 (1995)(describing the "basic purpose [ ] underlying the writ" as the correction of an error "that risks an unreliable trial outcome and the consequent conviction of an innocent person.")

This Court has also observed that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our

criminal justice system." Schlup at 513 U.S. at 325. Moreover, in In re Winship, 397 U.S. 352, 372, it was noted that it is far worse to convict an innocent man than to let a guilty man go free.

Given the principles espoused in previous cases by this Court (particularly in relation to the conviction of innocent individuals) about the Great Writ; the obvious disparity in the Circuits in tolling the statute of limitations where claims of actual innocence are presented; and the fact that these claims often arise in the habeas corpus context, it is respectfully requested that this Honorable Court accept supervision of this issue and grant the Writ of Certiorari to determine whether there should be equitable tolling when an individual makes a

showing of actual innocence under the Schlup standard.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant review of the important issues presented in this matter.

Respectfully submitted

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APPENDIX "A"
ORDER DENYING REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3097
DENIS CALDERON,

Appellant v.

THOMAS H. HOGAN, WARDEN, YORK COUNTY PRISON;

DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

The petition for rehearing filed by Appellant Denis Calderon in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ Dolores K. Sloviter
Circuit Judge Dated: December 17, 2007
ISC/cc: Jerome M. Brown, Esq.
Joshua S. Goldwert, Esq.

APPENDIX "B"
ORDER DENYING CERTIFICATE OF APPEALABILITY IN THE THIRD CIRCUIT COURT OF APPEALS

ALD-9 October 12, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 07-3097

DENIS CALDERON

VS.

THOMAS H. HOGAN, WARDEN, YORK COUNTY PRISON; ET AL.

(E.D. Pa. NO. 06-CV-01012)

Present: SLOVITER. FISHER AND HARDIMAN,
CIRCUIT JUDGES.

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(cX1) in the above-captioned case.

Respectfully,

MMW/KLB/isc Clerk

ORDER

The foregoing request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In particular, for the reasons explained by the Magistrate Judge, Calderon has not shown that reasonable jurists would debate the district court's dismissal of his petition on statute-of-limitation grounds. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: October 24, 2007
ISC/cc: Jerome M. Brown, Esq.
Joshua S. Goldwert, Esq.

APPENDIX "C"
ORDER OF THE HONORABLE JOHN P. FULLAM ADOPTING REPORT & RECOMMENDATION OF THE MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DENIS CALDERON

v.

THOMAS H. HOGAN, et al.

FILED CIVIL ACTION
JUN 1 4 2007
MICHAEL E. KUNZ, Clerk, Dep. C
By_____. -NO. 06-1012

ORDER

AND NOW, this 14th day of June , 2007, upon consideration of the Petition for Writ of a eas Corpus filed pursuant to 28 U.S.C. § 2254 and respondent's opposition thereto, and after review of the Report and Recommendation of United States Magistrate Judge L.

Felipe Restrepo, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;

2. The Petition for Writ of Habeas Corpus is DISMISSED as time-barred;

3. A certificate of appealability should not issue since, for the reasons set forth in the Report and Recommendation, petitioner has failed to show that a reasonable jurist could conclude that the Court is incorrect in dismissing the petition as time-barred.

BY THE COURT:

JOHN P. FULLAM, J.

APPENDIX "D"
REPORT & RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE FELIPE RESTREPO

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

DENIS CALDERON CIVIL ACTION

v.

THOMAS H. HOGAN, et al. NO. 06-1012

REPORT AND RECOMMENDATION

L. FELIPE RESTREPO May 11, 2007 UNITED STATES MAGISTRATE JUDGE

Before the Court is a Petition for Writ of Habeas Corpus filed by Denis Calderon pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated at the York County Prison in York, Pennsylvania. For the reasons which follow, the habeas petition should be dismissed as time-barred.

PROCEDURAL HISTORY

Following a bench trial in the Court of Common Pleas of Philadelphia, petitioner was convicted of Aggravated Assault, Simple Assault, Possession of an Instrument of Crime, Recklessly Endangering Another Person, and Criminal Conspiracy. See Commonwealth v. Calderon, No. 1551 EDA 2000, Mem. Op. at 4 (Pa. Super. July 11, 2002). He was sentenced to an aggregate term of imprisonment of two and a half (2 1/2) to ten (10) years in prison. M.

Post-sentence motions were denied, and following the appointment of new counsel, Calderon filed a direct appeal claiming insufficiency of the evidence to support his convictions and ineffective assistance of trial counsel for failing to call an expert medical witness. Id.; see Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 2 of 18 also Commonwealth v. Calderon, No. 3614 Phila. 1997, Mem. Op. at 1 (Pa. Super. filed Feb. 3, 1999). On February 3, 1999, finding petitioner's insufficiency of the evidence claim without merit, the Superior Court of Pennsylvania affirmed the judgments of sentence. See Pa. Super. Ct. Op. filed 7/11/02, at 4; Pa. Super. Ct. Op. filed 2/3/99, at 17. In that Calderon was raising his ineffective assistance claim for the first time on appeal, the Court remanded the case for a hearing on that claim. See Pa. Super. Ct. Op. filed 7/11/02, at 4; Pa. Super. Ct. Op. filed 2/3/99, at 16-17. On August 16, 1999, the Supreme Court of Pennsylvania denied allowance of appeal.' See Commonwealth v. Calderon, 737 A.2d 803 (Pa. Super. Feb. 3, 1999) (table), allocatur denied, 742 A.2d 671 (Pa. Aug. 16, 1999).

Pursuant to the Superior Court's February 3, 1999 remand Order, the trial court held a hearing in April 2000 on petitioner's ineffective assistance claim. See Pa. Super. Ct. Op. filed 7/11/02, at 5. Following the hearing, the trial court found that "trial counsel could have had no reasonable basis for failing to call Dr. [Walter] Hofman, a forensic pathologist who would have been willing to testify that the victim displayed no indication that he was hit with a blunt object."2 Id. at 5. Therefore, the trial court granted a new trial to both Calderon and his codefendant. Id.

1. In the meantime, the victim, who had suffered massive brain damage and had been in a near-vegetative state, see Pa. Super. Ct. Op. filed 2/3/99, at 3-4, died. See Petr.'s Br. at 2; Resp. to Hab. Pet. at 3. Calderon and his co-defendant were then charged with murder, but were acquitted by a jury on the murder charges. See id.; Petr.'s Br. at 2.

2. Calderon had been convicted for using an aluminum baseball bat while committing the crimes, and his co-defendant had been convicted for using an automobile anti-theft device commonly known as "The Club." See Pa. Super. Ct. Op. filed 7/11/02, at 2-3. The Superior Court found that, under Pennsylvania law, "although 'The Club' and a baseball bat are not inherently deadly weapons, the manner in which they were used in the present case qualified them as such." Id. at 9 (citing Pennsylvania caselaw).

However, the Commonwealth appealed, and on July 11, 2002, the Superior Court found that petitioner's trial counsel did not render ineffective assistance. Id. at 16. Calderon's trial counsel had testified at the evidentiary hearing that he and co-counsel had pursued a trial strategy of justification and self-defense, based on the theory that the victim had possessed a knife. Id. at 10. With regard to evidence related to whether the victim actually was struck, trial counsel pointed out that "the co-defendants were charged with attempting to cause bodily injury to the victim." Id. (emphasis in original). The Superior Court observed:

> It is clear that under Pennsylvania law, the Commonwealth was not required to demonstrate that [petitioner and his co-defendant] struck the victim to sustain convictions for the [charged] offenses. [Calderon and his co-defendant] could be found guilty of aggravated assault . . . merely for attempting to cause bodily injury to the victim with a deadly weapon, and of simple assault for employing physical menace to put the victim in fear of imminent serious bodily injury. Moreover, merely engaging in reckless conduct that may place another in danger of death or serious bodily injury suffices to sustain a conviction of reckless endangerment.

Id. at 9 (emphasis in original).

In addition, trial counsel testified at the hearing and the Superior Court stated in support of the denial of relief that the Commonwealth had introduced testimony at trial from a neuropsychologist that "the victim's medical records disclose[d] no evidence of external trauma to the head or to the abdominal wall," and that "the victim's condition, as specified in his medical reports, stemmed from an 'unknown etiology' that could have been due to an external trauma or it could have been caused by an internal anoxic event." Id. at 12-13 (citing N.T. 3/5/97, at 143, 145) (emphasis added). The neuropsychologist further acknowledged at the trial that, "based on the victim's medical records, it was not possible to state that the victim's

 condition stemmed from external trauma." See Pa. Super. Ct. Op. filed 7/11/02, at 13 (citing N.T. 3/5/97, at 146).

The Superior Court found:
In light of the elements the Commonwealth was required to establish to sustain convictions on the specific crimes charged, we cannot say that it was an unreasonable strategy for counsel to seek an acquittal on the grounds of justification and self-defense. Nor can we deem trial counsel unreasonable in choosing to forgo adducing cumulative evidence concerning facts already established via cross-examination of the Commonwealth's own witness.

See Pa. Super. Ct. Op. filed 7/11/02, at 15. The Court further observed that "the test is not whether other alternatives existed that were more reasonable, employing a hindsight evaluation." Id. (emphasis added). "[U]nder the circumstances presented" in this case, the Superior Court stated: "we cannot conclude that prior counsel for [Calderon and his codefendant] provided ineffective representation for failing to call Dr. Hoffman." Id. at 16. Accordingly, the Court reversed the trial court's Order, and reinstated the judgments of sentence. Id. On November 25, 2003, Pennsylvania's Supreme Court denied allowance of appeal. See Commonwealth v. Calderon, 808 A.2d 242 (Pa. Super. July 11, 2002) (table), allocatur denied, 837 A.2d 1177 (Pa. Nov. 25, 2003).

On March 7, 2006, Calderon filed his federal habeas petition. See flab. Pet. at 1. In her Response, the District Attorney of Philadelphia argues that the petition should be dismissed as time-barred, and in any event, Calderon's claims are procedurally defaulted and without merit. See Resp. to Hab. Pet. at 23-24.

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DISCUSSION

Section 101 of the Antiterrorism and Effective Death

Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), amended 28 U.S.C. § 2244 to impose a one-year period of limitation on applications for writs of habeas corpus by persons in state custody. See 28 U.S.C. § 2244(d)(1). Pursuant to the AEDPA, the limitation period begins to run from the latest of

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. Thus, under § 2244, unless one of the statutory exceptions applies, see id. § 2244(d)(1)(B)- (D), the one-year limitation period during which a habeas petition must be filed begins to run upon completion of direct review of the judgment of the state courts.

Here, in that the statutory exceptions to the general rule do not apply, the one-year period of limitation

began to run when the judgments of conviction became final.' See 28 U.S.C. §3. The petition does not (1) allege an "impediment to filing [his petition] created by State action in violation of the Constitution or laws of the United States," (2) assert a constitutional right "newly recognized by the Supreme Court," or (3) present a claim predicated on facts that could

5. Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 6 of 18, 2244(d)(1)(A). The judgments of conviction became final in this case on February 23, 2004, when the time for seeking review in the United States Supreme Court expired.4 See Kapral, 166 F.3d at 576 (holding that on direct review the limitation period of § 2244(d)(1)(A) begins to run at the expiration of the time for seeking review in the Unites States Supreme Court). Therefore, petitioner had one year after that date, see Sweger v. Chesney, 294 F.3d 506, 513 (3d Cir. 2002), cert. denied, 123 S. Ct. 1902 (2003), plus any time during which the period of limitation was tolled, to file a § 2254 petition. See Merritt v. Blaine, 326 F.3d 157, 161 (3d Cir. 2003); Swartz v. Meyers, 204 F.3d 417, 419-20 (3d Cir. 2000); Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998).

Calderon did not file the present habeas petition until March 7, 2006, more than two (2) years after the AEDPA's limitation period began running and more than one (1) year after the period of limitation expired. Since he failed to file his § 2254 petition within the

one-year period, absent tolling, his habeas petition was not timely filed. See Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 617-18 (3d Cir. 1998); Bums 134 F.3d at 111.

"The statute of limitations for federal habeas corpus petitions is subject to two tolling exceptions: (1) statutory tolling during the time a 'properly filed' application for state post-not "have been discovered through the exercise of due diligence" prior to the date the judgments of sentence became final. See 28 U.S.C. § 2244(d)(1)(B)-(C). It is no d that the factual predicates of his claims, including his claim of actual innocence, were not only "discover[able] through the exercise of due diligence," but were actually known to him, well before his convictions became final.

4. Petitioner's request for allowance of appeal was denied by the Supreme Court of Pennsylvania on Nov. 25, 2003. See Commonwealth v. Calderon, 837 A.2d 1177 (Pa. Nov. 25, 2003) (table); see also Hab. Pet. 9(b). Pursuant to Supreme Court Rule 13, petitioner had 90 days after that date, or until Feb. 23, 2004, to petition for certiorari review in the United States Supreme Court. See Kapral v. United States, 166 F.3d 565, 571 n.3 (3d Cir. 1999).

Case 2:06-cv-01012-JF Document 12 F i l e d 05/11/2007 Page 7 of 18 conviction review is pending in state court and (2) equitable tolling, a judicially crafted exception." Merritt, 326 F.3d at 161 (citing Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999)). With respect to statutory tolling, § 2244(d)(2) provides in relevant part that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted

toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). Here, in that Calderon did not file an "application for State post-conviction or other collateral review" in the Pennsylvania courts, see id., statutory tolling is not applicable. Indeed, Calderon concedes that "it is clear that the Petitioner did not file this Petition within one year of the exhaustion of state remedies." See Petr.'s Br. at 11 (emphasis added). Thus, "[t]here can be no dispute that absent a showing a equitable tolling, [Calderon's] petition is time-barred." See, e.g., Horning v. Lavan, 197 Fed. Appx. 90, 92 (3d Cir. Oct. 2, 2006).

The Court of Appeals for the Third Circuit has held that the federal habeas statute of limitations is subject to equitable tolling in only extraordinary circumstances. See Miller, 145 F.3d at 618. In Merritt v. Blaine, the Court of Appeals reiterated "the two general requirements for equitable tolling: (1) that 'the petitioner has in some extraordinary way been prevented from asserting his or her rights;' and (2) that the petitioner has shown that 'he or she exercised reasonable diligence in investigating and bringing [the] claims.'" Merritt, 326 F.3d at 168 (citing Fahy v. Horn, 240 F.3d 239, 244 (3d Cir.), cert. denied, 534 U.S. 944 (2001)) (emphasis added); see Pace v DiGuglielmo, 125 S. Ct. 1807, 1814 (2005) (observing that a litigant seeking equitable tolling bears the burden of establishing diligence and that "some extraordinary

7. Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 8 of 18 circumstance stood in his way") (emphasis added).5 "Mere excusable neglect is not sufficient." See Miller, 145 F.3d at 618-19. "The law is clear that courts must be sparing in their use of equitable tolling." See Jones, 195 F.3d at 159 (quoting

Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d Cir. 1999)) (emphasis added).

Here, petitioner fails to allege circumstances which would warrant invoking the sparing doctrine of equitable tolling. It is noted that "[i]n non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the `extraordinary' circumstances required for equitable tolling." Fahy, 240 F.3d at 244. Furthermore, lack of understanding or knowledge of the law is not an appropriate basis to invoke equitable tolling. See Jones, 195 F.3d at 160 (finding that equitable tolling is not applicable to a time-barred petition due to a petitioner's misunderstanding of the AEDPA's requirements); School Dist. of Allentown v. Marshall, 657 F.2d 16, 21 (3d Cir. 1981) ("[i]gnorance of the law is not enough to invoke equitable tolling").

Petitioner does not allege circumstances which prevented him in some extraordinary way from filing a timely federal habeas petition. See United States v. Bruce, 2002 WL 31757938, at *1 (D. Del. Nov. 26, 2002); United States v. Ramsey, 1999 WL 718079, at *2 (E.D. Pa. Aug. 26, 1999); see also Davis v. Artuz, 2001 WL 199454, at *3 (S.D. N.Y. Feb. 28, 2001) ("the petitioner must show that circumstances actually impeded the ability to file a timely

5. It is noted that the Supreme Court has not held that the AEDPA's period of limitations is subject to equitable tolling. In Pace, the Supreme Court clarified: "We have never squarely addressed the question whether equitable tolling is applicable to Ethel AEDPA's statute of limitations. . . . Because respondent assumes that equitable tolling applies and because petitioner is not entitled to equitable tolling

under any standard, we assume without deciding its application for purposes of this case." Pace, 125 S. Ct. at 1814 n. 8 (citation omitted) (emphasis added).

8. Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 9 of 18 petition. In arguing that equitable tolling is warranted in this case, petitioner alleges that ineffective assistance of trial counsel in failing to call Dr. Walter Hofman, a medical expert, and Patricia Waters, an eyewitness, to testify at trial constitutes "cause and prejudice" for his "procedural default." See Petr.'s Br. at 23. However, since petitioner's claim of ineffective assistance of trial counsel does not present a circumstance which "prevented" Calderon in some extraordinary way from filing a timely federal habeas petition, equitable tolling is not warranted. See Merritt, 326 F.3d at 168 (citing Fahy, 240 F.3d at 244) (emphasis added); see also Pace, 125 S. Ct. at 1814.

While petitioner argues that a "rigid application of the limitations period" would be unfair, see Petr.'s Br. at 11, it is noted that in this case, Calderon waited more than two years after the judgments became final to file his federal habeas petition. He cites to Lonchar v. Thomas. 517 U.S. 314 (1996), in arguing that this Court should consider the finality of dismissing his first federal habeas petition. See Petr.'s Br. at 12. However, it has been found that Lonchar "has nothing at all to do with equitable tolling, and it certainly does not hold that [a court] should consider the strength of the claims in a habeas petition when deciding whether equitable tolling is appropriate.'" Rouse, 339 F.3d at 252 (emphasis added).

Moreover, Lonchar, a capital case decided before the AEDPA (and its one-year period of limitation) took

effect, held that the Court of Appeals for the Eleventh Circuit could not properly dismiss a first habeas petition for special ad hoc equitable reasons beyond the framework

6. Indeed, it has been observed that "to the extent that Lonchar informs the analysis, however, it reinforces our belief that we should follow our equitable tolling decisions that restrict equitable tolling to narrow circumstances not present in this case." Rouse v. Lee, 339 F.3d 238, 252 (4th Cir. 2003) (emphasis added), cert. denied, 541 U.S. 905 (2004).

9. Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 10 of 18 embodied in statutes, rules, and precedent. See White v. Fair, 289 F.3d 1, 6 n.4 (1st Cir. 2001) (citing Lonchar). Thus, the Supreme Court's decision in Loncahr v. Thomas appears to represent a "confirmation that a statutory limitations period should be enforced." Cantu-Tzin v. Johnson, 162 F.3d 295, 298 (5th Cir. 1998) (emphasis added), cert. denied, 525 U.S. 1091 (1999); see Rouse, 339 F.3d at 252 (citing Cantu-Tzin).

Calderon argues that the statute of limitations should be equitably tolled because he was actually innocent. See Petr.'s Br. at 24 ("Calderon's actual innocence provides . . . [a] basis for equitably tolling the applicable statute of limitations"). Neither the Supreme Court nor the Third Circuit has held that the AEDPA's statute of limitations may be equitably tolled on the basis of actual innocence.' Zuniga v. Pennsylvania Bd. of Probation and Parole, 2007 WL 1002179, at *5 (E.D. Pa. Mar. 29, 2007); see. e.g., Horning, 197 Fed. Appx. at 93-94 ("we have yet to hold that the AEDPA statute of limitations can be equitably tolled on the basis of actual innocence"); LaCava v. Kyler, 398 F.3d 271, 274 n.3 (3d Cir. 2005) (declining

to address whether petitioner's actual innocence claim could overcome the AEDPA time bar). At least two Courts of Appeals that have addressed the question rejected such an exception. See Araujo v. Chandler, 435 F.3d 678, 682 (7th Cir. 2005) (holding that actual innocence is not a freestanding exception to the statute of limitations), cert. denied, 127 S. Ct. 39 (2006); Escamilla v. Jungwirth, 426 F.3d 868, 872 (7th Cir. 2005) ("Prisoners claiming to be innocent, like those contending that other events

7. In support of his claim for equitable tolling, petitioner cites cases, such as Dretke v. Haley, 124 S. Ct. 1847 (2004), Lonchar v. Thomas, and Coss v. Lackawanna County Distr. Att'y, 204 F.3d 453 (3d Cir. 2000) (en banc), rev'd, 532 U.S. 394 (2001), which, among other things, did not involve equitable tolling issues, let alone, claims of actual innocence as a trigger to equitably toll the AEDPA's period of limitation.

10. Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 11 of 18 spoil the conviction, must meet the statutory requirement of timely action.");' David v. Hall, 318 F.3d 343, 347 (1st Cir. 2003) (holding that petitioners "who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming"), cert. denied, 540 U.S. 815 (2003); see also Felder v. Johnson, 204 F.3d 168, 171 (5th Cir. 2000) (a claim of actual innocence would not constitute a "rare and exceptional" circumstance which would justify the equitable tolling of the limitations period, "given that many prisoners maintain they are innocent"), cert. denied, 531 U.S. 1035 (2000).

Furthermore, "the Third Circuit recently stated in

Horning v. Lavan . . . that even assuming (without deciding) that actual innocence was permitted to trigger equitable tolling of the AEDPA statute of limitations, a petitioner's claim would still fail if the petitioner did not exercise reasonable diligence in pursuing his actual innocence claim." Gilyard v. Tennis, 2007 WL 201015, at *2 (E.D. Pa. Jan. 17, 2007) (citing Horning) (emphasis and parenthesis added); see Horning, 197 Fed. Appx. at 93 (citing Miller, 145 F.3d at 618-19 ("we have held that a habeas petitioner 'must show that he or she exercised reasonable diligence in investigating and bringing [his] claims.'")). Specifically, where the habeas petitioner in Horning argued that equitable tolling was warranted due to his actual innocence, the Third Circuit affirmed the district court's dismissal of the habeas petition where he failed to show "the requisite diligence" between the time his state court appeal was no longer pending and the time he sought relief in the district court. See Horning, 197 Fed. Appx. at 94. Thus, "even were an 'actual innocence'.

8. The Escamilla Court explained: "Section 2244(d) has a rule for when new factual discoveries provide a fresh period for litigation; unless that standard is met, a contention that the new discoveries add up to actual innocence is unavailing." Escamilla, 426 F.3d at 872; see 28 U.S.C. § 2244(d).

11. Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 12 of 18 exception to the limitation period contained in § 2244(d), petitioner must have exercised reasonable diligence in raising his claim of actual innocence before the statute of limitations expired." Harold v. Shannon, 2006 WL 3717931, at *4 (E.D. Pa. Dec. 13, 2006) (emphasis added); see Pace, 544 U.S. at 418 ("Generally, a litigant seeking

equitable tolling bears the burden of establishing . . . that he has been pursuing his rights diligently"); Doe v. Menefee, 391 F.3d 147, 160-62 (2d Cir. 2004) (habeas petitioner seeking tolling of statute of limitations based on actual innocence must demonstrate "reasonable diligence during the period that he seeks to have tolled"), cert. denied, 126 S. Ct. 489 (2005); Flanders v. Graves, 299 F.3d 974, 978 (8th Cir. 2002) (for a claim that actual innocence should trigger equitable tolling "to be viable, . . . a petitioner would have to show . . . at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitation"), cert. denied, 537 U.S. 1236 (2003).

Similarly, here, where petitioner waited more than two years from the date the judgments of conviction became final, Calderon fails to even allege, let alone demonstrate, that he exercised reasonable diligence in pursuing his actual innocence claim. See, e.g, Horning., 197 Fed. Appx. at 94; Gilyard, 2007 WL 201015, at *2. Calderon bases his claim of actual innocence on evidence provided by Dr. Hofman and Patricia Waters. See Petr.'s Br. at 28 ("the 'newly discovered evidence' in the form of Dr. Hofman's and Ms. Waters' testimonies provide strong evidence to demonstrate that [petitioner] was actually innocent of these crimes"). However, petitioner knew of the testimony of both these witnesses in early 2000. See Petr.'s Br. at 21 (citing N.T. 3/30/00, at 49-72) (referring to Ms. Waters' testimony); Petr.'s Br. at 10 (citing N.T. 4/10/00, at 9-13) (referring to Dr. Hofman's testimony). Thus, the "newly discovered evidence,"

12. Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 13 of 18 see Petr.'s Br. at 28, was

available for several years prior to February 23, 2004, when the judgments of conviction became final and the AEDPA's period of limitations began running in this case, see supra note 3. Petitioner has not shown why, with the exercise of reasonable diligence, he was unable to file a timely federal habeas petition, when he had the facts to establish his claim of actual innocence well before the judgments of conviction became final. See, e.g., Harold, 2006 WL 3717931, at *4.

Therefore, even assuming that a viable claim of actual innocence could trigger equitable tolling of the AEDPA's statute of limitations, and even if petitioner could satisfy the stringent standard for establishing actual innocence, see House v. Bell, 126 S. Ct. 2064 (2006) (actual innocence "standard is demanding and permits review only in the extraordinary case"),9 Calderon's claim would nevertheless fail because he fails to allege circumstances indicating that he exercised reasonable diligence. See Horning v. Lavan, 197 Fed. Appx. 90, 93-94 (3d Cir. Oct. 2, 2006) ("even assuming that this court were to permit equitable tolling of the AEDPA statute of limitations when a viable claim of actual innocence has been presented, Horning's claim would nevertheless fail because he did not exercise reasonable diligence in pursuing his actual innocence claim") (emphasis added); Caviness v. Holt, 190 Fed. Appx. 157, 159 (3d Cir. July 19, 2006) (finding petitioner's "claim of actual innocence [did] not constitute an extraordinary circumstance because he had an earlier opportunity to raise this claim"), cert.

9. "To establish actual innocence, 'a habeas petitioner must 'persuade[] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'"

Sweger, 294 F.3d at 522 (citing Cristin v. Brennan, 281 F.3d 404, 420 (3d Cir. 2002)) (discussing actual innocence claim in the context of the procedural default doctrine where petitioner's federal habeas claim was procedurally defaulted in the state courts) (emphasis added). "Actual innocence means 'factual innocence, not mere legal insufficiency.'" Sweger, 294 F.3d at 523 (citing Bousley v. United States, 523 U.S. 614, 623 (1998)).

13. Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 14 of 18 denied, 127 S. Ct. 702 (2006); Gilyard, 2007 WL 201015, at *2; Chambers v. United States, 2006 WL 3708084, at *4 (D. Del. Dec. 14, 2006) (even assuming that "actual innocence" could excuse a time-bar, "equitable tolling [was] inappropriate . . . because [the petitioner] did not act with the requisite diligence"); Harold, 2006 WL 3717931, at *4; see, e.g.., Pace, 125 S. Ct. at 1815; Schlueter v. Varner, 384 F.3d 69, 78 (3d Cir. 2004), cert. denied, 544 U.S. 1037 (2005). Petitioner has not alleged facts sufficient to show that the "sparing" doctrine of equitable tolling should be invoked in this case. See Robinson v. Johnson, 313 F.3d 128, 143 (3d Cir. 2002) (quoting Jones, 195 F.3d at 159), cert. denied, 540 U.S. 826 (2003).

Finally, in addition to arguing that his actual innocence triggered equitable tolling of the one-year statute of limitations, Calderon argues, in the alternative, that application of the AEDPA's limitation period violates the Suspension Clause of the Constitution in this case. See Petr.'s Br. at 31. The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

It has recently been observed that "[i]t is well settled that the limitations period in [the] AEDPA does not suspend the writ of habeas corpus." Seaver v. Spencer, 2007 WL 851245, at *3 n.5 (D. Mass. Mar. 20, 2007); see David, 318 F.3d at 346-47 (application of the AEDPA limitation period to deny substantive review even of petition claiming "actual innocence" did not make the writ inadequate or ineffective to test the legality of applicant's detention and therefore does not violate the Constitution); Tinker v. Moore, 255 F.3d 1331, 1334 (11th Cir. 2001) (dismissal of habeas petition filed after one-year AEDPA statute of limitations does not violate the Suspension Clause), cert. denied, 534 U.S. 1144 (2002); Lucidore v. New York State Div.

14. Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 15 of 18 Parole, 209 F.3d 107, 113 (2d Cir. 2000) ("[B]ecause the AEDPA's one-year statute of limitations leaves habeas petitioners with some reasonable opportunity to have their claims heard on the merits, the limitations period does not render the habeas remedy 'inadequate or ineffective to test the legality of detention'") (citations omitted), cert. denied, 531 U.S. 873 (2000); Davis v. Bumgarner, 1999 WL 1032617 (4th Cir. 1999); Hampton v. M.K. Madding, 2000 WL 800724 (6th Cir. 2000) (rejecting Suspension Clause argument because § 2255 gave petitioner a year to pursue claims and petitioner provided no evidence that he diligently pursued those claims), cert. denied, 531 U.S. 1081 (2001); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998), cert. denied, 525 U.S. 891 (1998). Among other things, § 2244(d) does not foreclose habeas corpus relief for those who diligently pursue their claims, and the limitation period is subject to equitable tolling. See Ciria v. Cambra, 1998 WL 823026, at *3 (N.D. Cal. 1998) (citing Miller, 141

F.3d at 978); see also Merritt, 326 F.3d at 161 (citing Jones, 195 F.3d at 158); Rojas v. Cockrell, 44 Fed. Appx. 652 (5th Cir. June 7, 2002) (citing Bolo v. Johnson, 207 F.3d 773, 775 (5' Cir. 2000)) (the "AEDPA's statute of limitations only alters the procedure for bringing a habeas petition and does not unconstitutionally suspend the writ."). In this case, where petitioner inexplicably waited more than two years after the judgments of conviction became final before petitioning this court for habeas relief, and he failed to demonstrate extraordinary circumstances which prevented him from filing a timely petition, petitioner has failed to establish that he is entitled to equitable tolling. Accordingly, since Calderon failed to file his § 2254 petition within the one-year period of limitation, his petition should be dismissed as time-barred. See Miller, 145 F.3d at 617-18; Burns, 134 F.3d at 111.

Pursuant to Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals.

15 Case 2:06-cv-01012-JF Document 12 Filed 05/11/2007 Page 16 of 18 for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is required to make a determination as to whether a certificate of appealability ("COA") should issue. When a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, a COA may not issue unless the prisoner demonstrates that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 123 S. Ct. 1029, 1046 (2003) (Scalia, J., concurring); Woods v. Kearney,

215 F. Supp.2d 458, 464 (D. Del. 2002).

"Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Slack, 529 U.S. at 484; see Woods, 215 F. Supp.2d at 464. Here, for the reasons set forth above and in light of the aforementioned decisions invoking the AEDPA's period of limitation as a procedural bar, a reasonable jurist could not conclude that the Court would be incorrect in dismissing the petition as time-barred. See Slack, 529 U.S. at 484; see, e.g., Woods, 215 F. Supp.2d at 464 (finding that a COA should not issue where the habeas petition was barred by the one-year period of limitation under § 2244(d)(1)). Accordingly, a COA should not issue.

My Recommendation follows.

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RECOMMENDATION

AND NOW, this 11th day of May, 2007, upon consideration of the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 and respondent's opposition thereto, it is RECOMMENDED that the habeas petition be DISMISSED as time-barred and that a certificate of appealability should not issue.

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